IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 16

JERRY DOUGLAS MEMPA,

Petitioner,

vs.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

REPLY BRIEF OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 424

JERRY DOUGLAS MEMPA,

Petitioner,

vs.

B. J. RHAY, Superintendent,
Washington State Penitentiary,

Respondent.

REPLY BRIEF OF PETITIONER

On pages 9 through 12 of his brief in opposition to the petition for writ of certiorari, the respondent suggests that the petition should be denied, or action deferred, because the case might become moot before this case can be heard by the Court. The fact remains, however, that this case is not presently moot, and it is ripe for decision.

Admittedly, petitioner -- an inmate of the Washington Penitentiary -- is presently seeking release through normal state habeas corpus procedures. His chances of obtaining effective relief, however, are purely problematical at this point, and should not disqualify him from obtaining review by this Court of the substantial constitutional questions he has presented.

To aid the Court in understanding the nature of the habeas corpus relief sought by petitioner, and the procedural posture of that case, petitioner will attempt to explain it in some detail.

On April 28, 1966, the Washington State Supreme Court rendered an opinion in Dillenburg v. Maxwell, 68 Wash. Dec. 2d 481 -- P.2d --, holding that a judicial hearing is constitutionally required whenever a juvenile court relinquishes exclusive jurisdiction over a minor and remands him to the prosecuting authorities for treatment as an adult. In Dillenburg, the appellant was granted relief from the judgment and sentence, and the court ordered that he be retried within twenty days or discharged from custody.

Because petitioner Mempa was not given any sort of hearing when the juvenile court relinquished jurisdiction over him, he sought further habeas corpus relief after the Dillenburg decision came down, and after the decision below in the present case. But he also filed for certiorari in this Court.

Subsequently, however, on motion of the respondent in this case, rehearing was granted in the Dillenburg case, pursuant to Rule 50 of the Washington Supreme Court rules on appeal, which provides, inter alia, as follows:

> "Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing. . . . The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined." (italics added)

As respondent points out on pages 10 and 11 of his brief in opposition, he requested rehearing primarily on the issue of the relief granted in the Dillenburg case, i.e., retrial or discharge.

Under Rule 50, however, the entire Dillenburg decision was suspended when rehearing was granted, and the case was reargued on the merits on September 27, 1966. The respondent requested the relief explained on page 11 of his brief in this Court. The essence of his request is contained in subparagraphs (2) and (3). A de novo determination should be made of whether waiver of juvenile jurisdiction was proper initially. If, in the new hearing, it is found that waiver was not appropriate when made, the conviction stands. If waiver was not appropriate when made, the juvenile, who is by then usually an adult, must be retried or discharged from custody. By granting rehearing in the Dillenburg case, the Washington Supreme Court indicated its willingness to reconsider the type of relief to be granted in such cases.

Petitioner's case will probably be controlled by the new decision in Dillenburg -- assuming it is retroactive -- and accordingly his case was continued on October 7, 1966.

What relief, then, is petitioner apt to receive when Dillenburg is decided? If respondent's position there is accepted, petitioner can expect a de novo determination of whether juvenile court jurisdiction was properly waived in 1959. Appendix B in respondent's brief illustrates petitioner's prior criminal record. Consequently the petitioner does not anticipate a finding that juvenile court jurisdiction was improperly waived. In essence, he expects very little from his present petition for habeas corpus before the Washington Supreme Court. Only if the Washington Supreme Court adheres to its original decision, ordering retrial or discharge, and only if Dillenburg applies to his case, will the petitioner have achieved effective relief.

On the other hand, if review is granted now, and if the decision below is reversed, petitioner will obtain a new hearing ---

with counsel -- on the issue of probation revocation and sentencing. This is effective relief.

In summary, this Court should reject respondent's invitation to deny certiorari because of what might happen. The case is not moot now, and probable mootness will naturally be presented to the Court by the petitioner himself if and when the case does become moot.

Turning to the merits, respondent's brief is surprisingly silent on the strongest portion of petitioner's case -- his right to counsel at sentencing after probation was revoked. The Seventh Circuit opinion in Brown v. Warden, United States Penitentiary, 351 F.2d 564, discussed on pages 21-23 of respondent's brief, involved revocation of probation and execution of an already imposed -- but suspended -- sentence. It did not involve the issue presented here -- sentencing following probation revocation.

Furthermore, respondent's inconsistent and shifting position should be noted. As revealed by the record and petition for certiorari in Walkling v. Rhay, No. 734, a case presenting identical issues, respondent conceded to the Washington Court that appointment of counsel is constitutionally required at sentencing. In Walkling , this respondent asked the Washington Court to overrule Mempa.

The petition for writ of certiorari should be granted.

Respectfully submitted.

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